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No. 35.

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

THE STATE OF OHIO, *ex rel.*
JOHN C. POPOVICI, Vice-Consul of Roumania,
Appellant,

vs.

ABRAM W. AGLER, CHARLES KRICHBAUM and
EDWIN W. DIEHL,
Judges of the Court of Common Pleas
of Stark County, Ohio,
Appellees.

BRIEF FOR APPELLANT.

MALCOLM Y. YOST,
SQUIRE, SANDERS & DEMPSEY,
ATLEE POMERENE,
FRANK HARRISON,
Counsel for Appellant.

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

John C. Popovici is Vice-Consul of Roumania and is stationed at Cleveland, Ohio. On May 26, 1927, Helen Popovici commenced an action in the Court of Common Pleas of Stark County, Ohio for divorce and alimony and over objection by appellant to the jurisdiction of that Court, it entered an order against him for temporary alimony *pendente lite*. On September 22, 1928 this suit was begun in the Supreme Court of Ohio praying for a writ of prohibition from said Court to prohibit and restrain the appellees, Judges of the Court of Common Pleas of Stark County, Ohio from issuing and enforcing any judgment, decree or order, or from exercising any jurisdiction in said action for divorce and alimony. (R. 1, 3-5.) The appellees filed a general demurrer to said petition (R. 2, 7) upon the grounds

(a) That said petition does not state facts sufficient to constitute a cause of action;

(b) That said petition does not set up facts sufficient to entitle plaintiff to the relief prayed for, and

(c) That said petition is wholly insufficient in law to justify the Court to entertain, hear, try and determine the matter involved.

On the 26th of December, 1928, the Supreme Court of Ohio sustained the demurrer to said petition and denied the writ of prohibition. (R. 2.) Thereafter appellant petitioned this Court for a writ of certiorari which was allowed.

The petition for the writ of prohibition sets forth (R. 3-5) that said John C. Popovici is Vice-Consul of the Kingdom of Roumania, having been duly and regularly appointed to said office by the Kingdom of Roumania, and having been recognized and accepted by the United States Government as such; that he is stationed at Cleveland, Ohio; that he is an alien and citizen of Roumania; that on May 26, 1927, he was summoned to answer the action of Helen Popovici brought against him in the Court of Common Pleas of Stark County, Ohio, for divorce and alimony; that he always objected to and denied the jurisdiction of said Court of Common Pleas in said action; that said Court of Common Pleas had no jurisdiction of said cause by reason of Article III, Section 2 of the Constitution of the United States, and by reason of Section 256, paragraph 8 of the United States Judicial Code; that said Court of Common Pleas overruled his objection to its jurisdiction and proceeded to enter a judgment for temporary alimony against him and unless prohibited therefrom will restrain him of his liberty and jail him in contempt proceedings for non-payment of alimony although said Court had and has no jurisdiction whatever of the Vice-Consul and although all of its orders and judgments in said action are null and void.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS UPON WHICH APPELLANT RELIES.

The appellant relies upon Article III, Section 2 of the Constitution of the United States which provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

and upon Section 256, paragraph 8 of the Judicial Code, (R. S. Sec. 711; Mar. 3, 1911, c. 231, Sec. 256, 36 Stat. 1160; Oct. 6, 1917, c. 97, Sec. 2, 40 Stat. 395; June 10, 1922, c. 216, Sec. 2, 42 Stat. 635; U. S. C. A. Title 28, Sec. 371) which is as follows:

> "The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several states. * * *
>
> "(8) In all suits and proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls."

THE REASONING OF THE SUPREME COURT OF OHIO IN SUSTAINING THE DEMURRER AND DENYING THE WRIT OF PROHIBITION.

The opinion of the Supreme Court of Ohio upon sustaining the demurrer to the petition for writ of prohibition and denying such writ may be found in the record at pages 8 to 14. (*Ohio Law Bull. and Rep.*, Feb. 4, 1929; 119 O. S. 326.) From the opinion it is apparent that the Supreme Court of Ohio accepted the facts alleged in the petition as we have hereinbefore summarized them and also took into consideration the facts conceded during argument before that Court that Helen Popovici was at the time of the marriage a resident of Stark County, Ohio; that the marriage was contracted and consummated in Canton, Stark County; and that the proceedings in the action for divorce and alimony were regular in all respects except for the official position of the Vice-Consul.

The opinion concedes that under the constitutional and statutory provisions hereinbefore quoted, no ordinary action against the accredited representatives of a foreign government could be validly maintained in state courts. A doubt is suggested as to whether Congress would have the power to confer upon the federal courts exclusive jurisdiction, or any jurisdiction, over causes in which domestic relations are involved. However, the decision is not predicated upon that doubt. The decision is based upon the opinion that Section 256, subparagraph 8 of the United States Judicial Code quoted hereinbefore does not cover actions for divorce and alimony.

That conclusion is reached by reasoning that since this Court has held that the federal courts do not have jurisdiction over causes affecting domestic relations that unless the state courts have jurisdiction of such actions against diplomatic and consular representatives of foreign countries, the wife of such a representative would have no forum

in the United States wherein she could obtain relief. The opinion concludes as follows:

> "The language of paragraph 8 of Section 256 of the United States Judicial Code is in clear language, and yet it must be said that congress has not by that very clear language clearly manifested the legislative intent. The general intent of congress upon this entire subject is manifested by what is done and omitted rather than by what is said. By its omission to make any provision for the trial of divorce and alimony suits against foreign consuls in the federal courts it has manifested an intent and purpose to leave such controversies to the courts of the states."

THE ERRORS OF THE SUPREME COURT OF OHIO.

In not following the clear language of paragraph 8 of Section 256 of the United States Judicial Code quoted hereinbefore, the Supreme Court of Ohio, denied appellant the protection given him by the Congress of the United States, and that Court usurped the function of the Congress.

ARGUMENT.

THE STATUTE EXCLUDES STATE COURTS FROM JURISDICTION OF ACTIONS FOR DIVORCE AND ALIMONY AGAINST VICE-CONSULS.

Paragraph 8 of Section 256 of the United States Judicial Code quoted hereinbefore provides that the jurisdiction of the courts of the United States shall be exclusive of the courts of the several states in all suits and proceedings against vice-consuls. Certainly an action for divorce and alimony is a proceeding or suit. There is no more comprehensive term than "all." All means "every."

The opinion of the Supreme Court of Ohio states that the statute "is in clear language" but proceeds to find that the Congress did not mean what it said in such clear lan-

guage. In so finding, the Supreme Court of Ohio usurped the function of the Congress. Courts have no right to presume or to find that a statute does not mean what it says in clear language. The judicial function of interpreting and construing statutes stops short of disregarding clear language. Courts should not look to what the Congress did and omitted in order to ascertain legislative intent when such legislative intent is expressed in the statute in clear language.

Congress no doubt has had and has power to leave to the state courts jurisdiction of a certain class of cases against consuls, or for that matter jurisdiction of all kinds of cases against them. But Congress has acted and has taken jurisdiction of "all" cases from the state courts. Congress did not say it took from the state courts jurisdiction of all cases except those of divorce and alimony. Congress did not say that it took from the state courts jurisdiction of all cases provided we have given a remedy in the federal courts. If it had been so intended Congress would have said so. Such a holding by the courts would be judicial legislation.

The Supreme Court of Ohio in the paragraph of its opinion quoted hereinbefore disregarded its own previous correct statement of law given in its opinion in the case of *The Mahoning Park Company vs. The Warren Home Development Company,* 109 O. S. 358. In that case the Supreme Court of Ohio was asked to construe Section 8310 of the General Code of Ohio, contrary to its plain language. The first paragraph of the syllabus states the law of the case as follows:

> "The character, operation, and extent of a statutory lien must be ascertained from the statute creating and defining it. Such statute cannot be amended or extended by judicial construction to meet a situation not provided for nor contemplated thereby. The remedy is legislative."

In the case just cited, the Ohio Supreme Court was merely affirming and following the vigorous language of Judge Spear, formerly of the same bench, in the case of *Slingluff et al. vs. Weaver et al.*, 66 O. S. 621, which is undoubtedly the law of statutory interpretation in Ohio.

This was an action by taxpayers to enjoin a Village Mayor and Council from granting a franchise to certain persons for the operation of an electric railway. An act of the Legislature of Ohio was relied upon, and the parties differed as to the interpretation of the act. Concerning the meaning of the act and the interpretation of statutes, it is said, in the opinion of Judge Spear for the entire Court, on page 268:

> "Coming to the act itself, it must be apparent to every intelligent reader that, with respect to the question we are considering, there is no ambiguity or doubt as to the natural meaning of the words used. Taking it just as it comes to us from the hand of the lawmaking body, the import of the act is clear and explicit. To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. Plainly then, we are asked to import into the act a doubt as to its meaning and then resort to a change of phraseology, or punctuation, or to an addition of words, or to a rejection of classes of cases enumerated, in order to remove the doubt that we have thus created, a doubt based upon considerations and conjectures *aliunde*. This the court may not do. The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. The question is not so much what did the legislature intend to enact, as what did it mean by what it did enact. The words asked to be incorporated would be the words of the expounders and not of the law-makers."

This Court affirmed without opinion (218 U. S. 357 and 369), the judgment of the Circuit Court in *Ladew vs.*

Tennessee Copper Company, 179 Fed. 245. In the opinion of the Circuit Court it is said: (p. 252)

> "The construction and interpretation of statutes cannot extend to amendment or legislation, *U. S. vs. Fish,* 3 Wall. 445, 448, 18 L. Ed. 243; *Petri v. Creelman Lumber Co.,* 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281. Nor can considerations of hardship justify a strained construction of the law as written. *Jos. Schlitz Brewing Co. v. U. S.,* 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; *St. Louis, I. M. & S. R. Co. v. Taylor,* 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. 'The remedy, if any be required, is in Congress.' *Ex-parte Girard,* 3 Wall. Jr., 263, 10 Fed. Cas. 436, Fed. Cas. No. 5,457."

In *Caminetti vs. United States,* 242 U. S., 470 Mr. Justice Day in delivering the opinion construing the Mann Act on page 485 says:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the court is to enforce it according to its terms. *Lake County v. Rollins,* 130 U. S. 662, 670, 671; *Bate Refrigerating Co. v. Sulzberger,* 157 U. S. 1, 33; *United States v. Lexington Mill and Elevator Co.,* 232 U. S. 399, 409; *United States v. Bank,* 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone,* 175 U. S. 414, 421. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

> Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them. * * *"

Mackenzie vs. Hare et al., 239 U. S. 299 (1915). This was an action in mandamus to compel the Board of Elections to allow the plaintiff to register as a qualified voter. She was born and resided in California. In 1909 she married Gordon Mackenzie, a subject of the kingdom of Great Britain. They continued to reside in California, but he never became naturalized and it did not appear that he intended to do so. On March 2, 1907, prior to the marriage of the plaintiff in error, Congress enacted a statute, c. 2534, 34 Stat. 1228, providing:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registration as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

Mr. Justice McKenna in delivering the opinion says on Page 307:

> "Upon the construction of the act it is urged that it was not the intention to deprive an American-born woman, remaining within the jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the act and upon the report of the committee upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, 'that the intention of Congress was solely to legislate concerning the status of citizens *abroad* and the questions arising by reason thereof.' "

"Does the act invite or permit such assistance? Its declaration is general, 'that any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

In *Mulville vs. City of San Diego,* 183 Cal. 734, 192 Pac. 702, the Supreme Court of California was called upon to construe a statute of California relating to the power of municipal corporations and in its opinion (192 Pac. page 704) says:

"In construing a legislative enactment the intent of the Legislature must be determined primarily by attributing the ordinary and popular sense to the words of the statute where they are free from ambiguity and the result is not absurd, and this must be done even though it appear probable that a different object was in the mind of the Legislature. (Citing authorities.)

"A liberal construction does not mean enlargement of the plain provisions of the law." (Citing authorities.)

The Congress of the United States having determined and enacted that the jurisdiction of the Courts of the United States shall be exclusive of the courts of the several states in *all* suits and proceedings against vice-consuls, surely this Court will not hold such determination and

statute absurd. The reasons which prompted the framers of the Constitution to extend the judicial power of the United States to all cases affecting ambassadors and consuls and which prompted the Congress to make the jurisdiction of the courts of the United States in such cases exclusive of the courts of the several states, apply to divorce proceedings against diplomatic and consular representatives just as much as to other suits and proceedings against them. The United States has exclusive responsibility for international relations. A Vice-consul is a representative of a sovereign of equal dignity with the United States. The foreign sovereign thus represented may have peculiar laws relative to domestic relations. No state court should have the power to draw the United States into complications with a foreign sovereign and such complications might result from a divorce proceeding just as readily as from any other kind of a suit or proceeding.

This Court long ago decided that consular representatives are exempt from all suits and proceedings in the state courts. *Davis v. Packard*, 7 Pet. 276 (1834). The decision in that case was under an earlier form of this same statute which only differs from the present statute in that it excepted a few specific criminal matters. It is said in the opinion of this Court in that case: (p. 280)

> "As an abstract question it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls."
>
> (p. 285) "The act of Congress is *general*, extending to *all* suits against consuls."

At page 283 of the opinion the court held that the privilege and immunity is not personal to the consul, but is a privilege of the government which he represents. The Court of Appeals of New York in the *Valario* case cited below, held it is also a privilege of the Government of the United States. It is a privilege which he cannot waive.

The question has been decided by the courts of New York and Pennsylvania contrary to the opinion and decision of the Supreme Court of Ohio in this cause.

In *Higginson v. Higginson*, 158 N. Y. Sup. 92, it was held that under this act of Congress the courts of New York have no jurisdiction over an action for separation brought by the wife of the consul for the Republic of Peru against the consul in a New York court.

The reasons for excluding state courts from jurisdiction over consuls and other representatives of foreign governments is ably stated by the highest court of New York in the case of *Valario v. Thompson*, 7 N. Y., 576, where in the opinion at page 580, it is said:

> "The object of this exclusion was to keep within the control of the federal government, and subject to the authority of its courts, all cases and contingencies which might in any degree affect our foreign relations. The United States Government has an interest in maintaining this exclusive jurisdiction for the purpose of preventing it from being involved in controversies with foreign powers without its consent and for acts not its own. But this is a matter of internal regulation between the general government and the several states, over which foreign governments have no control. The exemption of a consul from liability to be sued in a state court, if it can be called a privilege, is not the privilege of the consul or his government, but of the United States Government; and therefore it cannot be renounced by the consul."

A Pennsylvania court has also held that the state courts of that state have no jurisdiction in suits and proceedings against consuls and vice-consuls. *Mauskardt v. Soderstrom*, 4 Binney 138. We also rely upon:

Sagory v. Wissman (D. C. N. Y.) (1868), Fed. Cas. No. 12227;

Griffin v. Dominguez, 9 N. Y. *Super.* Ct. (2 Duer) 656 (1853);

Sartori v. Hamilton, 13 N. J. Law (L. J. G. Green) 107 (1832);

Opinions of Attorney General of the United States, Vol. 1, page 406, (1820).

Reduced to its final analysis, the Ohio Supreme Court decision causes a situation whereby it means that a foreign consul or vice-consul can not be sued for divorce and alimony in the state courts of New York and Pennsylvania, and can be sued in the state courts of Ohio, an intolerable situation in view of the specific legislation of Congress upon this subject. Thus in the United States there might be forty-eight different kinds of liability for vice-consuls who might marry an American girl, depending upon the state in which they were temporarily located.

This Court has held in the cases cited in the opinion of the Supreme Court of Ohio that Federal Courts have no jurisdiction of suits or proceedings for divorce and alimony between persons of whom the state courts have jurisdiction, but so far as we have been able to find, it has never held that the Federal Courts have no jurisdiction of such suits or proceedings against diplomatic and consular representatives of foreign sovereigns.

June 30, 1927, Helen Popovici filed suit in equity in the District Court, N. D. Ohio, against appellant for divorce and alimony. Motion of appellant to dismiss the petition was sustained on July 15, 1927. (*Popovici v. Popovici*, 20 F. 2d. 185) The district judge held that provisions of the United States Judicial Code, Section 24, paragraph 16 (R. S. Sec. 563, par. 17; Mar. 3, 1911, c. 231, Sec. 24, par. 18; 36 Stat. 1093; U. S. C. A. Title 28, Sec. 41 par. 19) are not sufficiently explicit to warrant his disregard of the

general declarations of this Court that federal courts have no jurisdiction of divorce proceedings. Section 24, paragraph 18 of the *Judicial Code* is:

> "The district courts shall have original jurisdiction as follows:
>
> 18th. Of all suits against consuls and vice consuls."

The opinion of the district judge contains the following paragraph which explains the basis of his decision.

> "True it is that some of these cases involve a consideration of the case where the divorce action is against the consul of a foreign country, nevertheless it cannot be said that this positive language announced in successive cases by the Supreme Court is only to be decisive of the particular case under consideration."

Although the Federal Courts have no jurisdiction of divorce proceedings against diplomatic and consular representatives so that the wife of such a representative has no forum in the United States in which to obtain relief, nevertheless, the courts should not question the wisdom of Congress expressed in such clear language. Hardship does not justify judicial legislation. Perhaps the Congress in its wisdom desired to limit women who marry such aliens to the laws of the foreign sovereign for protection in their marital relations. The Congress may prefer that to international complications.

The Supreme Court of Ohio attached some weight to the fact that the marital contract was with an American woman and consummated in Ohio. That fact improves to no being irrelevant and immaterial. An American woman who marries an alien consul is presumed to have known the law of the land would protect him against litigation in state courts so long as he retained his consular position. If Congress had desired to give relief to an offended wife under such circumstances it undoubtedly would have done so.

THE STATUTE AS THUS CONSTRUED IS CONSTITUTIONAL.

We recognize the rule of statutory construction that where two constructions are possible and one will render the statute unconstitutional, and the other will make it valid, that construction will be placed upon the statute which will preserve the validity of the Act. But that rule has no place in this action because the statute is susceptible of only one construction.

We also recognize the rule that where two constructions of a statute are possible and one construction would lead to harsh and absurd results, where as the other would be fair and reasonable, that construction will be preferred which will be fair and reasonable. But that rule has no place in this action because first, the statute is not susceptible of two constructions and second, because giving literal effect to its clear language will not be harsh or absurd in view of the evident desire of the Congress to avoid international complications.

Article III, Section 2 of the Constitution of the United States extends the judicial power of the courts of the United States to "*all cases affecting ambassadors, other public ministers and consuls*". Since the decisions of this Court in the case of *Davis v. Packard*, 7 Pet. 276 and in the case of *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, the power of Congress to exclude the courts of the several states from jurisdiction of such cases can not be doubted. There is nothing in the Constitution limiting the power thus conferred upon the Congress by imposing a condition that the courts of the several states shall not be excluded from jurisdiction in such cases unless a remedy is provided in the federal courts. The power of Congress to exclude the courts of the several states from jurisdiction of all suits and proceedings against vice-

consuls is unlimited and not qualified by any condition that the federal courts afford a forum.

The plain language of the statute is in accord with sound international policy and fully authorized by the Constitution.

CONCLUSION.

Section 256, paragraph 8 of the United States Judicial Code applies to suits and proceedings for divorce and alimony against vice-consuls and is constitutional. The Supreme Court of Ohio erred in denying the writ of prohibition as prayed for by appellant.

WHEREFORE, appellant prays that this Court issue the writ of prohibition as prayed for and that relator be restored to all things he has lost by reason of the error of the Supreme Court of Ohio, including his costs herein.

Respectfully submitted,

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